

Supporting document for EPA decision to approve/deny revisions to  
Michigan's CWA Section 404 program resulting from enactment of  
Michigan Public Act 98 (July 2, 2013)

**This document supports EPA's decision to approve or deny proposed revisions to Michigan's assumed Clean Water Act (CWA) Section 404 permitting program resulting from enactment of Michigan Public Act (PA) 98 on July 2, 2013.** Approval, revision and withdrawal of state Section 404 programs is governed by Section 404(g)-(i) of the CWA, 33 U.S.C. § 1344(h)-(i), and 40 C.F.R. Part 233, Subparts A and B. 40 C.F.R. § 233.1(d) provides that a state-assumed program shall, at all times, be conducted in accordance with the requirements of the CWA and Part 233, and that state requirements must be at least as stringent as federal requirements. 40 C.F.R. § 233.16(d)(3) states, "The Regional Administrator shall approve or disapprove program revisions based on whether the program fulfills the requirements of the Act and this part ... ." 40 C.F.R. § 233.16(e) provides that program revisions become effective upon approval of the RA and publication of notice in the Federal Register.

**Background**

In 1984 the State of Michigan assumed authority to administer a permit program for the discharge of dredged or fill materials into waters of the United States under Section 404 of the CWA, 33 U.S.C. § 1344 *et seq.*

Michigan relies on two statutes as providing the principal authority for its CWA Section 404 program: Part 301 (*Inland Lakes and Streams*) and Part 303 (*Wetlands Protection*) of the Michigan Natural Resources and Environmental Protection Act (NREPA). Michigan has adopted administrative rules to implement both Parts of the NREPA. In this document, revised PA 98 sections beginning with "301" pertain to impacts to inland lakes, ponds, and streams; revised PA 98 sections beginning with "303" pertain only to Michigan's regulated wetland impacts.

In February 1997, the U.S. Environmental Protection Agency received a request from the Michigan Environmental Council to either ensure that the administration of Michigan's Section 404 program was consistent with the CWA, or withdraw Michigan's authority to administer the Section 404 program. In response to the request, EPA initiated a comprehensive informal review of Michigan's administration of the Section 404 program. This Program Review was completed in April 2008, and the findings were published in the Federal Register on July 31, 2008.

The 2008 Program Review identified several deficiencies in the State's Section 404 program. Major program deficiencies were found in the State's statutes, such as permitting exemptions for farming and maintenance activities that were broader than the federal Section 404 exemptions. In response to the 2008 Program Review findings, the Michigan Department of Environmental Quality (MDEQ) proposed a list of corrective actions it would undertake to address the program deficiencies identified by EPA. These corrective actions included making changes to the State's statutes governing State administration of the Section 404 program.

On July 2, 2013, Michigan enacted Public Act 98, which contained significant amendments to both Part 301 (Inland Lakes and Streams) and Part 303 (Wetlands Protection) of Michigan's NRE PA. The statutory revisions included changes intended to address some of the corrective actions identified in EPA's 2008 Program Review, as well as changes that affect other aspects of Michigan's Section 404 program. On July 5, 2013, MDEQ submitted PA 98 to EPA as a proposed revision to its CWA Section 404 program.

As required by 40 C.F.R. § 233.16 (d)(3), EPA solicited public input and held a hearing in Lansing, Michigan, in December 2013 on the proposed revisions to Michigan's Section 404 program. EPA also consulted with the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service, and undertook tribal consultation with the tribes in Michigan per EO 13175 and EPA policy. Comments received through the public input process and a summary of the hearing are in the EPA Docket, available at [www.regulations.gov](http://www.regulations.gov), Docket ID: EPA-HQ-OW-2013-0710.

In a November 24, 2014, letter to William Creal, MDEQ, EPA requested clarification on the State's interpretation of a number of provisions within PA 98. AAG Robert Reichel of the Michigan Department of the Attorney General (Michigan AG) responded to this request in a letter dated May 27, 2015.

EPA's review of the proposed revisions to Michigan's Section 404 program resulting from PA 98 does not constitute a comprehensive review of the State's program for conformance with the CWA, but rather addresses only proposed changes to Michigan's program related to PA 98, ensuring their consistency with CWA Section 404 and its implementing federal regulations, including the current definition of waters of the United States.<sup>1</sup> Specifically, this action does not address deficiencies identified in EPA's 2008 Program Review that PA 98 did not resolve.

### **Public Act 98 – Discussion and Findings**

The following summarizes EPA's review of the proposed program revisions resulting from PA 98, including a summary of each proposed revision, discussion of its effect, and EPA's finding. Findings are categorized as follows:

**Consistent:** The change meets the minimum federal statutory and regulatory requirements. **Such revisions are approvable under CWA Section 404.**

**Does not affect consistency:** The change does not affect the underlying consistency of the program with CWA Section 404 and federal regulations. This includes, for example, technical corrections to change names of state government organizations. "Does not affect consistency" may also mean that the PA 98 change is compatible with federal requirements or does not affectively alter Michigan's Section 404 program. *For example,*

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<sup>1</sup> On June 29, 2015, the EPA and the Corps published the final rule defining the scope of waters protected under the CWA known as the Clean Water Rule. This rule was effective on August 28, 2015, and was later stayed by federal court order on October 9, 2015. If the rule goes into effect, EPA requests that MDEQ review the new rule and evaluate whether changes to Michigan's Section 404 program are necessary for it to remain as stringent as the federal Section 404 requirements. This action is separate from the review of Michigan's program revisions under PA 98. The following analysis of PA 98-based revisions to Michigan's Section 404 program is based on the pre-Clean Water Rule definition of "waters of the United States" and only pertains to federally jurisdictional waters.

*PA 98 requires that MDEQ take certain actions such as developing general permits or administrative rules. Where the language in PA 98 does not include restrictions that would prevent MDEQ from carrying out the specific action in accordance with federal requirements, EPA's finding is that PA 98 "does not affect consistency" with federal requirements. Such revisions are approvable under CWA Section 404.*

**Inconsistent:** The change does not meet the minimum federal requirements. **Such revisions are subject to disapproval under CWA Section 404.**

## **1. Sec. 1307 – permit processing timeframes**

This section was revised with respect to Michigan's approval or denial of wetlands dredge and fill permit applications.

### **Discussion**

Changes made to this section include requirements that permit approvals and denials be made in writing and be made consistent with the State's Administrative Procedures Act, and that the denials document that decisions are made based on scientific provisions of the State statute, sufficient facts, data, and scientific principles and methods. These changes do not affect the consistency of Michigan's 404 program with the permit requirements under CWA Section 404 and federal regulations.

### **Finding:**

Changes to this section **do not affect consistency** with the permit requirements under CWA Section 404 and federal regulations.

## **2. Sec. 30101a – Statement of Purpose**

PA 98 includes this new section stating that the powers, duties, functions, and responsibilities exercised by Michigan because of the federal approval under CWA Section 404 apply only to navigable waters and waters of the United States, as defined by the CWA, federal regulations, and court decisions.

### **Discussion:**

EPA finds this statement of program scope to be consistent with the CWA, federal regulations, and federal case law.

### **Finding:**

This section is **consistent** with CWA Section 404 and federal regulations.

### 3. Sec. 30103(1)(d)(i) and (ii) – Exemption for Maintenance of Agricultural Drains

This section exempts maintenance of an agricultural drain<sup>2</sup> from permitting requirements if all of the following are met:

- (i) *The maintenance includes only activities that maintain the location, depth and bottom width of the drain as constructed or modified at any time before July 1, 2014.*
- (ii) *The maintenance is performed by the landowner or pursuant to the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630.*

#### **Discussion:**

CWA Section 404(f)(1)(C) exempts from 404 permit requirements the construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches that meet the definition of a “water of the U.S.”

40 C.F.R. § 232.3(c)(3) makes clear that the exemption applies to the “the maintenance (but not construction) of drainage ditches.” Although maintenance is not specifically defined in 40 C.F.R. § 232.3(c)(3), the regulation states that modifications that “change the character, scope, or size of the original fill design” do not constitute maintenance and therefore are not subject to the permitting exemption.

The 2008 Program Review found that the State’s permitting exemptions for agricultural drainage ditch maintenance were broader than the federal exemptions because the State’s exemptions included both drain modification activities and drain maintenance activities. To be consistent with the CWA and federal regulations, the State’s exemption for drain maintenance must be limited to activities that preserve the ditch or drain in its proper condition, as designed.

The statutory amendments in PA 98 have narrowed the State’s permitting exemption to include only drain maintenance activities and not drain modification. The only activities now exempt are those that maintain the location, depth and bottom width of the drain. In its review, EPA raised a question as to whether the revisions in PA 98 would exclude from the maintenance exemption activities that also preserve the “character of the drain” including, for example, the material lining the drain. EPA posed this question to Michigan.

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<sup>2</sup> Section 30103(3) defines agricultural drain as: “...a human made conveyance that meets all of the following requirements:

*Does not have continuous flow; Flows primarily as a result of precipitation-induced surface runoff or groundwater drained through subsurface drainage systems; Primarily serves agricultural production; and, Was constructed prior to January 1, 1973, or was constructed in compliance with this part of former PA 203.” For the purpose of this document, EPA considers the term “agricultural drain” in Section 30305(2)(i) equivalent to “drainage ditches” listed in 40 C.F.R. § 232.3.*

In its May 27, 2015, response to EPA's request for clarification, the Michigan AG's office notes that it understands the federal "character" requirement to apply only to "maintenance of currently serviceable structures" under 40 C.F.R. § 232.3(c)(2), and not to drain maintenance as referred to in PA 98, which corresponds more closely to 40 C.F.R. § 232.3(c)(3). Because 40 C.F.R. § 232.3(c)(3) does not define maintenance, and 40 C.F.R. § 232.3(c)(2) includes a clear description of drainage ditch maintenance, EPA finds it reasonable to consider maintenance referred to in 40 C.F.R. § 232.3(c)(3) in the same manner as it is described in 40 C.F.R. § 232.3(c)(2). The Michigan AG confirmed that the exemption under Section 30103(1)(d)(i) would not exempt a change in the material lining of the drain, and any inconsistency in interpretation of the character requirement for maintenance is not central to this review. Therefore, the character would be preserved under the agricultural drain exemption in Section 30103(1)(d)(i), and the types of activities that are now exempt under Section 30103(1)(d)(i) are consistent with the exemption for drainage ditch maintenance in the CWA regulations at 40 C.F.R. § 232.3(c)(3).

EPA interprets the effect of the program changes in PA 98 to:

- (1) require 404 permits for any modification of drains undertaken following enactment of PA 98 (July 2, 2013);
- (2) limit the maintenance exemption to the listed activities which maintain either the as-built condition, or a modified condition where that modification was either authorized by a 404 permit or carried out prior to enactment of PA 98 (July 2, 2013); and
- (3) limit the maintenance exemptions to drains that were either constructed or modified prior to July 1, 2014

EPA sought clarification from MDEQ as to whether the State agrees with EPA's interpretation of this section. In its May 27, 2015, letter, the Michigan AG replied that its interpretation of this section differed in part from EPA's interpretation of the changes. Regarding EPA interpretation (1) described above, the Michigan AG interprets Section 30103(1)(d)(i) to require permits for modification of county drains after July 1, 2014, rather than after the July 2, 2013, enactment date of PA 98. Similarly, the Michigan AG noted its interpretation differed from EPA's interpretation (2) described above in that the Michigan AG interprets the maintenance exemption as limited to activities that maintain the as-built condition or modified condition that existed prior to July 1, 2014, rather than July 2, 2013. Since both the July 2, 2013, and July 1, 2014, dates are in the past, EPA finds that the effect of the different interpretations on Michigan's program is not significant. Regarding EPA's interpretation (3), described above, which limits the maintenance exemption to agricultural drains constructed or modified prior to July 1, 2014, the Michigan AG agrees with EPA's interpretation.

The federal exemption in CWA Section 404(f)(1)(C) does not include implementation dates similar to the July 2, 2013, or July 1, 2014, dates within Section 30103(1)(d)(i). Nevertheless, at this point in time, these dates do not have a practical effect on Michigan's

ongoing program implementation and the inclusion of the dates does not affect Michigan's program consistency with federal requirements.

Section 30103(1)(d)(ii) also requires that maintenance be performed by the landowner or pursuant to the drain code of 1956. This condition does not affect consistency with federal requirements.

**Finding:**

The changes made to Section 30103(1)(d)(i) now limit the exempted activities to maintenance, and are **consistent** with federal regulations. The language at Section 30103(i)(d)(ii) **does not affect consistency** with federal requirements.

[See also comments #6, #16, #17]

**4. Sec. 30103(1)(e) – Exemption for Waste Collection or Treatment Facility Construction in Upland**

PA 98 modifies an existing permit exemption for waste collection or treatment facilities. The revised exemption applies to facilities ordered to be constructed or approved for construction “under state or federal water pollution control law, if constructed in uplands.” The phrase “under state or federal water pollution control law” replaced the phrase “by the department,” and the words “if constructed in uplands” were added.

**Discussion:**

Section 30101(v) states, “Upland’ means the land area that lies above the ordinary high-water mark.” This definition clarifies that the phrase “if constructed in uplands” means that this exemption would only apply to activities that occur above the ordinary high water mark of an inland lake or stream, and it would not authorize the placement of dredge or fill material within waters of the United States<sup>3</sup>. The inclusion of “if constructed in upland” alters this provision to be outside the scope of the CWA Section 404.

**Finding:**

Changes to this section are **consistent** with CWA Section 404 and federal regulations.

**5. Sec. 30103(1)(f) – Exemption for Construction and Maintenance of minor drainage structures**

This section includes a modification to an existing exemption to add the words “and rural development” following the words “department of agriculture.”

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<sup>3</sup> Because this exemption is located in Part 301 (*Inland Lakes and Streams*) of the Michigan NREPA, impacts to wetlands associated with waste collection or treatment facility construction would not be exempt under Section 30103(1)(e). Instead, wetland impacts would be regulated under Part 303 (Wetlands) of the NREPA.

### **Discussion:**

This change in this section reflects the change in the name of the state department and does not change the meaning of the exemption.

### **Finding:**

The change in this section **does not affect consistency** with CWA Section 404 and federal regulations.

## **6. Sec. 30103(1)(g) – Exemption for Maintenance of Drains**

This section was revised to delete “improvement of all drains” as an exempt activity. The following language was added to this section:

*As used in this subdivision, “maintenance of a drain” means the physical preservation of the location, depth, and bottom width of a drain and appurtenant structures to restore the function and approximate capacity of the drain as constructed or modified at any time before July 2014, and includes, but is not limited to, the following activities if performed with best management practices:*

- (i) Excavation of accumulated sediments back to original contours.*
- (ii) Reshaping of the side slopes.*
- (iii) Bank stabilization where reasonably necessary to prevent erosion. Materials used for stabilization must be compatible with existing bank or bed materials.*
- (iv) Armoring, lining, or piping of a previously armored, lined or piped section is being repaired and all work occurs within the footprint of the previous work.*
- (v) Replacement of existing control structures, if the original function of the drain is not changed and the original approximate capacity of the drain is not increased.*
- (vi) Repair of stabilization structures.*
- (vii) Culvert replacement, including culvert extensions of not more than 24 additional feet per culvert.*
- (viii) Emergency reconstruction of recently damaged parts of the drain. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.*

### **Discussion:**

Changes to this section clarify that “improvement of all drains” is no longer an exempt activity, and to define maintenance to mean “*the physical preservation of the location, depth, and bottom width of a drain and appurtenant structures to restore the function and approximate capacity of the drain.*” Similar to Section 30103(d), changes to the present section narrow the exemption to include only maintenance activities. In its review, EPA raised the question as to whether the program revisions in PA 98 would limit the maintenance exemption to activities that also preserve the “character of the drain,” as required by the federal exemption, including the material lining the drain. EPA posed this question to Michigan.

The Michigan AG's May 27, 2015, response to EPA's question whether maintenance under Section 30103(1)(g) would preserve the "character of the drain" echoed its response to the same question regarding Section 30103(1)(d). For a detailed discussion, see discussion No. 3 pertaining to 30103(1)(d). Ultimately, the Michigan AG confirmed that the exemption under 30103(1)(g) would not exempt a change in the material lining of the drain, and any inconsistency in interpretation of maintenance is not central to this review. Moreover, the types of activities that are now exempt under Section 30103(1)(g) are consistent with the exemption for ditch maintenance in the CWA regulations at 40 C.F.R. § 232.3(c)(3).

EPA interprets the effect of the changes in PA 98 to:

- (1) require 404 permits for any modification of drains which is undertaken following enactment of PA 98 (July 2, 2013);
- (2) limit the maintenance exemption to the listed activities which maintain either the as-built condition, or a modified condition where that modification was either authorized by a Section 404 permit or carried out prior to enactment of PA 98 (July 2, 2013); and
- (3) limit the maintenance exemptions to drains that were either constructed or modified prior to July 1, 2014.

As it did for Sections 30103(1)(d), 30305(2)(h), and 30305(2)(i), EPA sought clarification from MDEQ as to whether the State agrees with EPA's interpretation of this section. In its May 27, 2015, letter, the Michigan AG replied that its interpretation of this section differed in part from EPA's interpretation of the changes. For a detailed discussion of the Michigan AG's response, see discussion No. 3 pertaining to Section 30103(1)(d).

The federal exemption in CWA Section 404(f)(1)(C) does not include similar enactment dates to the July 2, 2013, or July 1, 2014, dates within Section 30103(1)(g). At this point in time, the enactment dates do not have a practical effect on Michigan's ongoing program implementation. As additional conditions that are not within the CWA Section 404(f)(1) exemptions that will not have a significant effect on ongoing program implementation, the inclusion of the dates does not affect Michigan's program consistency with federal requirements.

Changes to this section also include a non-inclusive list of eight activity types which are considered maintenance for the purpose of this section. These activities are generally consistent with the federal maintenance exemption, provided they are carried out in a manner that complies with Section 30103(1)(g). However, activity (vii) *culvert replacement* is not consistent with the federal exemption. An extension of 24 feet of a culvert to an existing structure is not maintenance of a currently serviceable structure to its original design, nor is it a minor impact. An extension of any length of a culvert within a water of the U.S. requires fill and it is not an exempt activity under 404(f)(1)(C) or any other exemption of the CWA.

**Finding:**

Revisions to Section 30103(1)(g) are generally **consistent** with the CWA and federal regulations, and satisfy a corrective action from EPA's 2008 Program Review (*activities (g)(i)-(g)(vi) and (g)(viii)*). However, the specific exemption for culvert extensions (*activity (g)(vii)*) is **inconsistent** with CWA 404 exemptions for maintenance of drains<sup>4</sup>. [See also comments #3, #16, #17.]

**7. Sec. 30103(1)(m) – Exemption for Controlled Access of livestock to Streams**

Section 30103(1)(m) is a new exemption for the construction of structures built to provide livestock access to water or crossing. The exemption is conditioned on the animal access or crossing being constructed in accordance with USDA, NRCS applicable practice standards.

**Discussion:**

The CWA contains an exemption at Section 404(f)(1)(A) for normal farming, ranching, and silviculture practices if they are part of an "established (*i.e.*, ongoing) farming, silviculture, or ranching operation." 40 C.F.R. § 232.3(c)(1)(ii)(A). However, unlike the exemption at CWA Section 404(f)(1)(A), Section 30103(1)(m) is not limited to established (*i.e.*, ongoing) operations. Because Michigan's exemption is not limited to ongoing farming, silviculture, or ranching operations, this provision is broader than the exemptions in the CWA and federal regulations.

**Finding:**

This section is **inconsistent** with CWA Section 404(f) and federal regulations.

**8. Sec. 30103(3) – Definition of Agricultural Drain <sup>4</sup>**

This section of PA 98 added a definition of "agricultural drain" as follows:

*As used in this part, "agricultural drain" means a human made conveyance that meets all of the following requirements:*

- (a) Does not have continuous flow.*
- (b) Flows primarily as a result of precipitation-induced surface runoff or groundwater drained through subsurface drainage systems.*
- (c) Serves agricultural production.*
- (d) Was constructed prior to January 1, 1973, or was constructed in compliance with this part of former 1979 PA 203.*

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<sup>4</sup> This discussion is only relevant for drains that meet the definition of waters of the U.S. EPA has determined that some drains as used in Section 30103(1)(g) meet the definition of a water of the U.S.

**Discussion:**

The CWA and implementing regulations do not include or define the term “agricultural drain.” The State’s addition of a term which does not exist in federal law does not in itself raise questions of consistency with federal law. However, the way in which the term is used may raise these questions, specifically, the use of the term in Section 30103(1)(d) (agricultural drain maintenance exemption) discussed above, and in Section 30305(h) (agricultural drain maintenance exemption), and Section 30321(6) (Use of drains to establish jurisdiction) discussed below.

Please see the specific findings related to Sections 30103(1)(d), 30305(h), and 30321(6).

**Finding:**

The addition of the definition of agricultural drains **does not affect consistency** with the CWA and federal regulations.

**9. Sec. 30104 – Changes to Michigan Fee Requirements**

All of the changes to this section of the statute relate to permit application fees.

**Discussion:**

Matters related to state permit fees do not affect consistency with the CWA.

**Finding:**

The changes to this section **do not affect consistency** with CWA Section 404 and federal regulations.

**10. Sec. 30105(3) and (5) – Public Notice Provisions**

PA 98 includes minor non-substantive changes to language related to public notice. The words “persons or” were struck, and the words “or other persons” were added.

**Discussion:**

With these changes, Sections 30105(3) and (5) still provide for sufficient public notice as required under 40 C.F.R. § 233.32(b)(3).

**Finding:**

Changes to this section **do not affect consistency** with CWA Section 404 and federal regulations.

#### **11. Sec 30105(8)(b) – Maintenance and repair of existing pipelines**

The section was revised to add the “inland” prior to the word “lake.”

##### **Discussion:**

This change clarifies that this section pertains to inland lakes. Jurisdiction of Part 301 is over inland lakes and streams. This change clarifies Section 30105(8)(b) consistency with Part 301 and does not alter the State 404 program’s consistency with CWA Section 404.

##### **Finding:**

Changes to this section **do not affect consistency** with CWA Section 404 and federal regulations.

#### **12. Sec 30105(9) – Conditions on projects authorized under a minor project category or general permit**

The section was revised to add the “inland” prior to the word “lake.”

##### **Discussion:**

These changes clarify that Michigan’s jurisdiction pertains to inland lakes. Jurisdiction of Part 301 is over inland lakes and streams. This change clarifies Section 30105(8)(b) consistency with Part 301 and does not alter the State’s 404 program’s consistency with CWA Section 404 and federal regulations.

##### **Finding:**

Changes to this section are **consistent** with CWA Section 404 and federal regulations.

#### **13. Sec 30105(11) – Department to develop General Permits for drain activities by Dec 31, 2013.**

This section of the statute requires that MDEQ develop a General Permit for a number of activities in drains, which include but are not limited to: installation and replacement of culverts, clear span bridges, and end sections; drain realignments; installation of bank stabilization structures and grade stabilization structures; spoil placement; and other common drain activities that use best management practices. Paragraph (b) of this section authorizes MDEQ to issue general permits for these types of activities to drain commissioners or a drainage board on a county-wide basis. Paragraphs (c) - (e) include provisions related to the timing of permits, reporting on drain activities, and restrictions on eligibility for a drain commissioner or drainage board with significant violations that have not been corrected.

### **Discussion:**

Pursuant to the CWA Section 404 assumption regulations at 40 C.F.R. §§ 233.21 and 233.50, before MDEQ can issue a General Permit, it must assess the proposed activities for compliance with the 404(b)(1) Guidelines. MDEQ must then determine whether or not the regulated activities will cause only minimal adverse environmental effects when performed separately, or have only minimal cumulative adverse effects.

PA 98 language does not prevent MDEQ from developing general permits that are consistent with federal regulations. MDEQ will need to develop the general permits consistent with the requirements at 40 C.F.R. §§ 233.21 and 233.50. EPA will also review draft general permits for consistency with CWA Section 404 requirements.<sup>5</sup>

### **Finding:**

Changes to this Section **do not affect consistency** with the CWA and regulations at 40 C.F.R. §§ 233.21 and 233.50.

## **14. Sec. 30305(2)(d) – Modified exemption for grazing of animals**

This section includes a revision to the previous exemption for grazing of animals to include language regarding the placement of fencing associated with grazing as an exempt activity.

### **Discussion:**

The CWA Section 404 regulations define the discharge of fill material and specifically highlight the placement of pilings. 40 C.F.R. § 232.2 states that the “(i) *Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit.*” For this analysis, EPA considers the placement of fence posts to be analogous to the placement of pilings<sup>6</sup>.

Under CWA Section 404 and § 232.2, where fence construction would not require fill and where fence posts do not have the effect of fill, a Section 404 permit would not be required. Section 30305(2)(d) outlines the specific parameters of a fence designed to control livestock,

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<sup>5</sup> On September 9, 2013, MDEQ proposed a general permit for drain maintenance activities. EPA reviewed the permit, provided comments on November 21, 2013, and approved the final drain general permit on February 19, 2014.

<sup>6</sup> “In addition, placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions. (i) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material.” 40 C.F.R. § 232.2 (*Discharge of fill material*) (2).

including that the fence does exceed 11 feet in height and utilizes an amount of material not to exceed a woven wire fence utilizing 6-inch vertical spacing and posts. With this design criteria, fence placement for the purpose to control livestock, in itself, would not have the effect of fill, and would not require a CWA Section 404 permit.

**Finding:**

The exemption of the placement of fencing is **consistent** with the CWA and federal regulations.

**15. Sec. 30305(2)(e) – Modified exemption for farming, horticulture, agriculture, silviculture, lumbering and ranching.**

This section of PA 98 added the following statutory language which clarified the conditions which must be met in order for an activity to be exempt as a farming, silviculture or ranching activity:

- (i) *Beginning October 1, 2013, to be allowed in a wetland without a permit, these activities shall be part of an established on-going farming, ranching, horticultural or silvicultural operation. Farming and silvicultural activities on areas lying fallow as part of a conventional rotational cycle are part of an established ongoing operation, unless modifications to the hydrological regime or mechanized land clearing are necessary to resume operation. Activities that bring into farming, ranching, horticultural or silvicultural use an area not in any of these uses, or that convert and area from a forested or silvicultural use to a farming, ranching or horticultural use, are not part of an established on-going operation.*
- (ii) *Minor drainage does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland, or conversion from 1 wetland use to another. Minor drainage does not include the construction of a canal, ditch, dike or other waterway or structure that drains or otherwise significantly modifies a stream, lake or wetland.*

**Discussion:**

A number of corrective actions were identified in EPA's 2008 Program Review relating to the farming, silvicultural and ranching exemption.<sup>7</sup> EPA asked the State to clarify that the exemption only applies to areas which at the time of the discharge were part of an established on-going farming, silvicultural or ranching operation. The State was also asked to amend the law to make clear that discharges which allow an area to be converted from one exempted use to another exempted use are subject to regulation (the "recapture" provision).

EPA requested clarification from Michigan as to whether the revised language is interpreted consistently with the federal recapture provisions. In its May 27, 2015, response, the

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<sup>7</sup> The State statute also includes references to "horticulture" and "lumbering" that are not included in CWA Section 404(f)(1)(A) or implementing regulations. EPA considered this during its 2008 Program Review and did not require corrective actions to modify the statute. See page 12, EPA Final Report, May 2008.

Michigan AG states that it interprets Section 30305(2)(e)(i) and (ii) as being fully consistent with the “recapture” provision of CWA Section 404(f)(2), as well as relevant provisions of 40 C.F.R. § 232.3. Specifically, the Michigan AG notes that Section 30305(2)(e) is similar to the recapture provisions in Section 404(f)(2) in that they both “require recapture of conversion from wetland to non-wetland use, or from one type of wetland use to another type of wetland use.” EPA agrees that Section 30305(2) meets the minimum requirements of CWA Section 404(f)(2).

**Finding:**

The addition of the language in (i) and (ii) makes the State exemptions for farming, silvicultural and ranching operations **consistent** with the CWA and federal regulations at 40 C.F.R. §§ 232.3(c)(1)(ii) and (6)(d)(3)(ii).

**16. Sec. 30305(2)(h) – Modified exemption for maintenance of agricultural drains**

This section was revised to delete references to improvements of drains as exempt activities. Additional language was added to exempt:

*(h) Maintenance of an agricultural drain, regardless of outlet, if all of the following requirements are met:*

- (i) limit maintenance to activities that maintain the location, depth, and bottom width of the drain as constructed or modified at any time before July 1, 2014.*
- (ii) Require that maintenance be performed by the land owner or pursuant to the drain code of 1956 ... .*
- (iii) Specify that maintenance does not include any modification that results in additional wetlands drainage or conversion of a wetland to a use to which it was not previously subject.*

**Discussion:**

CWA Section 404(f)(1)(C) exempts from 404 permit requirements the “construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches.”<sup>8</sup> 40 C.F.R. § 232.3(c)(3) makes clear that exemption applies to the “the maintenance (but not construction) of drainage ditches.” The 2008 Program Review found that the State’s permitting exemptions for agricultural drainage ditch maintenance were broader than the federal exemptions because the State’s exemptions included both drain modification activities and drain maintenance activities. In order to be consistent with the CWA and federal regulations, the exemption for ditch maintenance must be limited to

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<sup>8</sup> This discussion is only relevant for agricultural drains that meet the definition of waters of the U.S. EPA has determined that some agricultural drains as defined in Section 30103(1)(g) meet the definition of a water of the U.S. (See Discussion No. 9).

activities that preserve the ditch or drain in its proper condition, as designed. Construction activities such as ditch relocation, enclosing a ditch in a pipe, or lining a new section of a ditch are not exempt from permitting under the CWA and federal regulations.

In this section of PA 98, the language regarding operation or improvement, which included straightening, widening or deepening of agricultural drains and drains legally established under the drain code of 1956, has been deleted, in response to a corrective action from EPA's 2008 Program Review. The types of activities that are now exempt under Section 30305(2)(h)(i) are consistent with the exemption for ditch maintenance in the CWA regulations at 40 C.F.R. § 232.3(c)(3).

The statutory amendments in PA 98 have narrowed the exemption to include only maintenance activities. The only activities now exempt are those that maintain the location, depth and bottom width of the drain. In its review, EPA raised a question as to whether the revisions in PA 98 would limit the maintenance exemption to activities that also preserve the "character of the drain" including, for example, the material lining the drain. EPA posed this question to Michigan.

The Michigan AG's May 27, 2015, response to EPA's question whether maintenance under Section 30305(2)(h) would preserve the "character of the drain" echoed its response to the same question regarding Sections 30103(1)(d) and 30103(1)(g). For a detailed discussion, see discussion No. 3 pertaining to 30103(1)(d). Ultimately, the Michigan AG confirmed that the exemption under 30305(2)(h) would not exempt a change in the material lining of the drain. Any inconsistency in interpretation of maintenance is not central to this review, and the types of activities that are now exempt under Section 30305(2)(h) are consistent with the exemption for ditch maintenance in the CWA regulations at 40 C.F.R. § 232.3(c)(3).

EPA interprets the effect of the changes in PA 98 to:

- (1) require 404 permits for any modification of drains which is undertaken following enactment of PA 98 (July 2, 2013); and
- (2) limit the maintenance exemption to the listed activities which maintain either the as-built condition, or a modified condition where that modification was either authorized by a 404 permit or carried out prior to enactment of PA 98 (July 2, 2013); or
- (3) limit the maintenance exemptions to drains that were either constructed or modified prior to July 1, 2014.

As it did for Sections 30103(1)(d), 30103(1)(g), and 30305(2)(i), EPA sought clarification from MDEQ as to whether the State agrees with EPA's interpretation of this section. In its May 27, 2015, letter, the Michigan AG replied that its interpretation of this section differed in part from EPA's interpretation of the changes. For a detailed discussion of the Michigan AG's response, see discussion No. 3 pertaining to 30103(1)(d).

The federal exemption in CWA Section 404(f)(1)(C) does not include similar enactment dates to the July 2, 2013, or July 1, 2014, dates within Section 30305(2)(h). At this point in time, the enactment dates do not have a practical effect on Michigan's ongoing program implementation. As additional conditions that are not within the CWA Section 404(f)(1) exemptions that will not have a significant effect on ongoing program implementation, the inclusion of the dates does not affect Michigan's program consistency with federal requirements.

**Finding:**

EPA finds that changes made to Section 30305(2)(h)(i) (which limit the exempted activities to maintenance) and Section 30305(2)(h)(iii) (which clarifies that drain maintenance does not include any modification that results in additional wetland drainage or conversion of a wetland to a use to which it was not previously subject) are **consistent** with the CWA and federal regulations.

*[See also #3, #6 and #17.]*

**17. Sec. 30305(2)(i) – Exemption for Drain Maintenance**

This is a new section which defines exempt drainage ditch maintenance to be limited to:

*“... the physical preservation of the location, depth, and bottom width of a drain and appurtenant structures to restore the function and approximate capacity of the drain as constructed or modified at any time before July 1, 2014, including placement of spoils removed from the drain in locations along that drain where spoils have been previously placed. Maintenance of a drain under this subdivision does not include any modification that results in additional wetland drainage or conversion of a wetland to use to which it was not previously subject.”*

**Discussion:**

The statutory amendments in PA 98 have narrowed the exemption to drain maintenance activities, including those that maintain the location, depth and bottom width of the drain. In its review, EPA considered whether the revisions in PA 98 would limit the maintenance exemption to activities that also preserve the “character of the drain” including, for example, the material lining the drain. EPA posed the question regarding the “character of the drain” to Michigan.

The Michigan AG's May 27, 2015, response to EPA's question whether maintenance under Section 30305(2)(i) would preserve the “character of the drain” echoed its response to the same question regarding Section 30103(1)(d). For a detailed discussion, see discussion No. 3 pertaining to 30305(2)(i). Ultimately, the Michigan AG confirmed that the exemption under 30305(2)(i) would not exempt a change in the material lining of the drain, and any inconsistency in interpretation of maintenance is not central to this review, and the types of activities that are now exempt under Section 30305(2)(i) are consistent with the exemption for ditch maintenance in the CWA regulations at 40 C.F.R. § 232.3(c)(3).

EPA interprets the effect of the changes in PA 98 to:

- (1) require 404 permits for any modification of drains which is undertaken following enactment of PA 98 (July 2, 2013); and
- (2) limit the maintenance exemption to the listed activities which maintain either the as-built condition, or a modified condition where that modification was either authorized by a 404 permit or carried out prior to enactment of PA 98 (July 2, 2013); or
- (3) limit the maintenance exemptions only to drains that were either constructed or modified prior to July 1, 2014 (i.e., maintenance of drains constructed or modified after July 1, 2014, would require a permit).

As it did for Sections 30103(1)(d), 30103(1)(g), and 30305(2)(h), EPA sought clarification from MDEQ as to whether the state agrees with EPA's interpretation of this section. In its May 27, 2015, letter, the Michigan AG replied that its interpretation of this section differed in part from EPA's interpretation of the changes. For a detailed discussion of the Michigan AG's response, see discussion No. 3 pertaining to Section 30103(1)(d). The federal exemption in CWA Section 404(f)(1)(C) does not include similar enactment dates to the July 2, 2013, or July 1, 2014, dates within Section 30305(2)(i). At this point in time, the enactment dates do not have a practical effect on Michigan's ongoing program implementation. As additional conditions that are not within the CWA Section 404(f)(1) exemptions that will not have a significant effect on ongoing program implementation, the inclusion of the dates does not affect Michigan's program consistency with federal requirements.

The exemption at Section 30305(2)(i) includes the deposit of spoils along a drain where spoils have been previously placed. EPA has considered this spoils placement exemption in the context of the final sentence in Section 30305(2)(i), which requires a permit for activities that would result in the conversion of a wetland to a new use.

The "recapture provision" in CWA Section 404(f)(2) includes a similar statement that an activity is regulated if the activity converts the wetland "*into a use to which it was not previously subject.*"<sup>9</sup> As such, Section 30305(2)(i) would not exempt an activity, such as spoils placement, if it would convert an area from a wetland to an upland use, or from one wetland use to another.

EPA finds that Michigan's proposed drain maintenance exemption meets the minimum requirements in CWA Section 404(f)(2), including the federal recapture provision, but that Sec. 30305(2)(i) creates uncertainty by exempting the ". . . *placement of spoils removed from the drain in locations along that drain where spoils have been previously placed.*" This language potentially creates confusion by suggesting that the placement of spoils along the

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<sup>9</sup> 33 U.S. Code § 1344(f)(2); 40 CFR § 232.3.

drain into a wetland may be exempt even if the placement of spoils convert that wetland to a use to which it was not previously subject. If a location where spoils were previously placed is wetland at the time new spoils are placed, the placement of new spoils would not be exempt because they would likely convert the wetland to an upland use, which is a “use which it was not previously subject.” Therefore, the placement of spoils into a wetland would rarely be exempt under Section 30305(2)(i). EPA recommends that Michigan amend the language to clarify this exemption.

**Finding:**

This section is **consistent** with Section 404 of the CWA. [See also #3, #6 and #16.] However, to avoid confusion EPA recommends that Michigan clarify the language exempting “*placement of spoils removed from the drain in locations along that drain where spoils have been previously placed.*”

**18. Sec. 30305(2)(j) – Modified exemption for construction or maintenance of farm roads, forest roads or temporary roads for moving mining or forestry equipment**

This section includes changes to a previously existing exemption Sec. 30305(2)(i). These changes include replacing the word “assure” with the word “ensure,” and deleting the word “otherwise” preceding the word “minimized.”

**Discussion:**

These changes do not affect consistency with the exemption at CWA Section 404(f)(2).

**Finding:**

The changes made to this section **do not affect consistency** with the CWA and federal regulations.

**19. Former Sec. 30305(2)(j) – Deletion of former Exemption for Farm Production and Harvesting**

PA 98 has deleted the section of the statute that previously exempted “*drainage necessary for the production and harvesting of agricultural products.*”

**Discussion:**

The 2008 Program Review identified the exemption of drainage for agricultural purposes found under this section to be inconsistent with federal regulations. The deletion of the exemption for drainage associated with agricultural production addresses the problem identified in the 2008 Program Review.

**Finding:**

The change to remove this section is **consistent** with the CWA and federal regulations. This addresses a corrective action from EPA's 2008 Program Review.

**20. Sec. 30305(2)(k) – Modified exemption for Maintenance of Public Streets**

Changes were made to this section that now limit the exemption for road maintenance<sup>10</sup> to activities that do not include any modification that changes the original location or footprint of the road and is done in a manner that minimizes adverse effects on wetlands.

**Discussion:**

The language in Section 30305(2)(k) that exempted any work carried out within the right-of-way, regardless of whether or not changes were made to the original road location or footprint, has been deleted. PA 98 revised this section of the statute to only exempt true maintenance activities as defined in CWA regulations. This section now limits exempt road maintenance activities to activities that do not change the size or location of a road, and it would not authorize the placement of dredged or fill material into wetlands. Therefore, the modified exemption is consistent with CWA regulations at 40 C.F.R. § 232.3(C)(2).

**Finding:**

This section is now **consistent** with the CWA and federal regulations. This completes the corrective action regarding road maintenance requested in the 2008 Program Review.

**21. Sec. 30305(2)(l) – Exemption for Maintenance or Repair of Utility Lines**

This section was changed to replace a previous exemption for maintenance of pipelines with a new exemption for maintenance of utility lines and support structures. [Previously, maintenance of electric transmission and distribution lines was addressed in Section 30305(2)(m).] As defined, utility lines includes pipes or pipelines, and electrical transmission lines.

**Discussion:**

During EPA's 2008 Program Review, MDEQ indicated it would seek revisions to this section to make it consistent with the CWA. While the revised exemption language in Section 30305(2)(l) no longer includes reference to construction or operation of gas or oil pipelines, the statute continues to exempt the maintenance of pipelines, an exemption that does not exist in 40 C.F.R. § 232.3. The Corps of Engineers has issued NWP 12, which covers such activities.

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<sup>10</sup> During the 2008 Program Review, EPA considered road maintenance to be covered under 40 C.F.R. § 232.3(c)(2) (maintenance of bridge abutments, approaches and transportation structures).

For many activities authorized by NWP 12, if specific conditions are met, the Corps does not require preconstruction notification when minimal aquatic resource impacts are planned (i.e., “non-reporting” permit).

The addition of conditions to Section 30305(2)(l), including requirements that: (i) wetland impacts are minimized; ii) there is no change to the original utility line design; and (iii) there is no change in the use of the wetland, limits Michigan’s utility maintenance exemption to authorization of minimal wetland impacts. The condition that no change of use is allowed under this provision also disallows a change of wetland type (*e.g.*, forested to emergent, natural to farmed) and decrease in wetland size. The three added conditions limit the applicability of the exemption to specific activities that would likely fit within a “non-reporting” NWP 12 authorization.

EPA’s standard for approving proposed revisions to state 404 programs under 40 C.F.R. § 233.16 is that the proposed program revision “fulfills the requirements of the Act and [applicable federal regulations] . . . .” Because the provision in Section 30305(2)(l) is limited to activities that would likely be authorized by a non-reporting NWP 12, the proposed revision is as protective as the Corps’ non-reporting NWP 12, and, therefore, fulfills the requirements of the CWA and applicable federal regulations.

NWPs are renewed every five years. If NWP 12 were substantively amended or its use discontinued, MDEQ would need to re-evaluate whether the provision in Section 30305(2)(l) still meets the requirements of the CWA and applicable regulations. To ensure that this exemption remains consistent with the CWA, MDEQ must revise the 2011 EPA/MDEQ Memorandum of Agreement (MOA) outlining Michigan’s administration of Section 404 of the CWA. The revision would add a five-year re-evaluation requirement of Section 30305(2)(l)’s consistency with NWPs and ensure that the exemption fulfils the requirements of the CWA.

Specific requirements of the review would be finalized in the MOA, but would include the following:

1. The review would consider factors such as any environmental impacts that the exemption may be causing, any changes to the utility line maintenance requirements at the federal level, etc.;
2. MDEQ would provide public notice and opportunity for comment; and
3. MDEQ would submit a report summarizing its review to both EPA and the MI legislature, so that EPA and the legislature would have the opportunity to consider whether any changes to the exemption are warranted.

**Finding:**

With the condition that the 2011 MOA between EPA and MDEQ is revised to require a re-evaluation every five years of whether Section 30305(2)(l) fulfils the requirements of the CWA and federal regulations, this section is **consistent** with federal law.

## 22. Sec. 30305(2)(m) – Exemption for Installation of Utility Lines

Following EPA's 2008 Program Review, the State was to seek modification to this section to be consistent with federal regulation. Section 30305(2)(m) has been re-written to exempt certain activities associated with the installation of utility lines. Exempt activities are limited to directional drilling, boring or knifing-in of utility lines or placement of poles with less than cubic yard of structural support. Directional drilling or boring must occur four feet below the soil surface of a wetland and entry and exit holes cannot be located in a wetland. To be exempt under PA 98, the installation cannot result in the eruption or release of any drilling fluids into a wetland.

### Discussion:

CWA regulations at 40 C.F.R. § 232.3 do not include exemptions for the specific activities provided for in Section 30305(2)(m), but some of these activities, such as directional drilling or boring, are not activities that are regulated under the CWA Section 404 because they do not involve discharge of fill material into waters of the United States. The placement of pilings, which includes installation of some utility poles may, but does not always, include the discharge of fill material.<sup>11</sup> If an activity does not involve the discharge of fill material into waters of the United States, it is not regulated under the CWA Section 404.

Knifing-in would only be exempt if it does not result in discharge of fill material. Because the term knifing-in is not defined in PA 98, this provision could lead to situations where activities referred to as "knifing in" would involve discharges regulated under CWA Section 404, but would be exempt from regulation under State law. For this reason, this section is inconsistent with CWA Section 404 and federal regulations. Wherever utility installation can be accomplished without discharge to waters of the United States it is not regulated under CWA Section 404.

### Finding:

The provisions of this section which provide permit exemptions for some utility pole placement and knifing-in are **inconsistent** with CWA Section 404 and federal regulations where these activities involve the placement of dredge or fill material into waters of the United States.

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<sup>11</sup> "[P]lacement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions. (i) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material." 40 C.F.R. § 232.2 *Discharge of fill material* (2).

**23. Former Sec. 30305(2)(o) – Construction of iron or copper tailings basin and water storage areas.**

Former Section 30305(2)(o) exempted the construction of iron and copper mining tailings basins and water storage areas. This exemption has been eliminated in PA 98.

**Discussion:**

There is no exemption for construction of tailings basins under CWA Section 404. The 2008 Program Review included a corrective action that the State eliminate this exemption.

**Finding:**

Deletion of the exemption for tailings basins is **consistent** with the CWA and federal regulations. This addresses a corrective action from EPA's 2008 Program Review.

**24. Sec. 30305(2)(o) – Exemption for Placement of Biological Residues in Wetlands**

The new language added to this section exempts the following:

*Placement of biological residuals from activities, including the cutting of woody vegetation or the in-place grinding of tree stumps, performed under this section within a wetland, if all the biological residuals originate within that wetland.*

**Discussion:**

The additions to Section 30305(2)(o) create a new exemption that would allow clearing of forested wetlands and the placement of biological material (including woody material) in the wetland. The CWA does not include any exemption for biological materials placed in wetlands regardless of the fill's origin.

40 C.F.R. § 232.2 defines fill material as:

*"[T]he term fill material means material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States."*

Examples of fill material listed with the definition at 40 C.F.R. § 232. 2 specifically include woodchips, which would be exempt as biological materials under Section 30305(2)(o), but are not exempt under the CWA as they would meet the definition of fill material. Also, biological materials are explicitly listed in the statutory definition of "pollutant," and a variety of seminal court cases discuss the "discharge" of woody wetland vegetation into a jurisdictional wetland in the course of land clearing as a Section 404-regulated discharge. *See e.g., Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

**Finding:**

This section is **inconsistent** with the CWA, federal regulations, and case law.

**Note on the following Sections 30305(4):**

- *Section 30305(4) exempts from regulation the incidental creation of wetlands as a result of various activities. During EPA review, it was unclear whether the wetlands being incidentally created and exempt from regulation under Michigan law are only those wetlands created within the footprint of the referenced activities, or whether these would also include wetlands incidentally created outside the footprint upstream or downstream from the referenced activity. This distinction is important because, while some wetlands incidentally created within the footprint may be appropriately excluded from regulation, those outside the footprint may not be. EPA sought clarification from MDEQ on the scope of the incidentally created wetlands referenced in Section 30305(4). In response, the Michigan AG explained that Sections 30305(4) “exclude from regulation only the incidentally created wetlands that lie within the footprint of the subject sand, gravel, or mineral excavation area, storm water facility or drainage ditch. They do not exclude wetlands created outside of (adjacent to, upstream of, or downstream of) the footprint of such projects.”*
- *The Clean Water Rule was published in the Federal Register on June 29, 2015, and became effective on August 28, 2015; it was later stayed on October 9, 2015. The following analysis is an evaluation of the consistency of the changes in PA 98 to federal regulations, including the currently effective definition of “waters of the United States” (not the definition under the Clean Water Rule).*
- *There is an apparent inconsistency between the federal regulation and Section 30305(4). The definition of “waters of the United States” includes, inter alia, traditional navigable waters, interstate waters, and territorial seas, and adjacent wetlands. See, e.g., 40 C.F.R. § 328.3(a). These waters cannot be excluded from the definition of “waters of the United States.” The exclusions within Section 30305(4) do not include a similar condition and may exclude some incidental wetlands that would fit the definition of interstate waters. Because this inconsistency is not directly related to PA 98 revisions, EPA is not disapproving the proposed changes based on this inconsistency. Rather, EPA is providing this comment to help inform Michigan’s review of its program for conformity with the definition of “waters of the U.S.” currently in effect.*
- *Part 303 of the Michigan NREPA includes the term “upland” in multiple sections, including some sections with changes enacted by PA 98. Section 30301 includes definitions of terms used in other sections of Part 303, but no definition is included for “upland.” In contrast, Section 30101 does define “upland” for the purposes of Part 301. Section 30103 states: “Upland” means the land area that lies above the ordinary high-water mark.” Because not all wetlands have an ordinary high-water mark, this definition is not relevant for Part 303, which covers the regulation of wetlands. For this analysis related to Part 303, EPA reads the term “upland” as equivalent to “dry land” in the*

*definition of “waters of the U.S.” and not equivalent to the definition of “upland” with Section 30101.*

*The individual subsections are discussed below:*

**25. Sec. 30305(4)(a) – Incidental creation of wetlands from excavation done as part of commercial sand, gravel or mineral mining**

The revisions to the existing Section 30305(4)(a) include the addition of the terms “as part of commercial” as well as including gravel mining to the provision. Two conditions (i) *and* (ii), described below, are also PA 98 additions. As revised by PA 98, Section 30305(4)(a) excludes wetlands from regulation where the wetlands are incidentally created as a result of excavation for mining activities if the area was not a wetland before excavation. Under this section, a wetland that is incidentally created as a result of one or more of the following activities is not subject to regulation until the property on which the wetland is located meets both the following requirements:

- i. Is no longer used for excavation as part of commercial sand, gravel or mineral mining.*
- ii. Is being used for another purpose unrelated to excavation as part of commercial sand, gravel or mineral mining.*

Under revised Section 30305(4)(a), wetlands incidentally created as a result of commercial sand, gravel or mineral mining would not be regulated if either condition (i) or (ii) is not met.

**Discussion:**

The revisions to Section 30305(4)(a), adding the word “gravel” does not affect the underlying consistency of this section with CWA Section 404. The language in Section 30305(4) is similar to the preamble language from the 1986 and 1988 Federal Register notices regarding the CWA Section 404 program regulations. The preamble language indicates that, generally speaking, waters of the United States do not include:

*“Pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the . . . excavation operation is abandoned and the resulting body of water meets the definition of a water of the US.”*

Conditions (i) and (ii) in Section 30305(4)(a) suggest that the mine is abandoned, which is referenced in the preamble as a condition for the pit not to be a “water of the U.S.”

**Finding:**

The proposed revisions to Section 30305(4)(a) **do not affect consistency** with CWA.

*Note:*

*EPA has identified two inconsistencies between Section 30305(4)(a) and the federal regulation as described in the 1986 and 1988 regulatory preamble language. These inconsistencies are not connected to the changes enacted by PA 98. EPA is noting this to help inform Michigan's review of its program as a whole for conformity with the federal regulations*

*The 1986 and 1988 regulatory preambles include a note acknowledging that EPA, and, pursuant to agreements with the EPA, the permitting authority may "determine on a case-by-case basis if any of these waters are 'waters of the United States'". Section 30305(4)(a) would not allow for any case-by-case analysis of jurisdiction based on the characteristics of the wetland. Therefore, it is inconsistent with the federal provision.*

*The federal exclusion described in the 1986 and 1988 preamble includes a condition that the feature was excavated in dry land. By comparison, 30305(4)(a) includes the condition that that the feature was created in an area that was not a wetland. The term "in dry land" would include any area that is not a water of the United States while "not a wetland" would not cover streams, lakes, and ponds. Therefore, wetlands incidentally created as a result of commercial sand and gravel mining excluded by 30305(4)(a) may meet the definition of a "water of the U.S."*

**26. Sec. 30305(4)(b) – Incidental creation of wetlands due to construction or operation of a water treatment pond or storm water facility**

This is a revision to a pre-existing provision which stated that wetlands incidentally created by the construction or operation of a waste treatment pond or lagoon are not subject to regulation. PA 98 revised this section to add a reference to storm water treatment facilities. Under the revised statute wetlands created by the construction or operation of these facilities would not be regulated by MDEQ.

**Discussion:**

Subsections of 30305(4) exclude wetlands created incidentally as a result of the activities listed in each section. These exclusions are overly broad and could result in the exclusion from permitting some wetlands that do meet the definition of a water of the U.S. Specifically, the addition of "storm water treatment facilities" to Michigan's waste treatment exclusion creates a categorical exclusion from regulation for impacts to all wetlands within storm water facilities.

Under the CWA definition of waters of the U.S., some waters may be jurisdictional even where used as part of a stormwater management system. While the EPA agrees that stormwater facilities, and wetlands within them, designed to meet the requirements of the CWA are not "waters of the United States" when they are created in dry land, Section 30305(4)(b) does not specify that the features must be created in dry land. Therefore, wetlands incidentally created due to construction or operation of a water treatment pond or

storm water facility excluded by 30305(4)(a) may in some cases meet the definition of a “water of the U.S.” and these waters that meet the definition of a water of the U.S. are subject to CWA section 404 permitting requirements.

**Finding:**

This revision is **inconsistent** with the CWA Section 404 and federal regulations.

**27. Sec. 30305(4)(d) – Incidental creation of wetlands due to construction of drains in uplands for removing excess soil moisture from upland agricultural areas**

This is a new provision which states that wetlands incidentally created by the construction of drains in upland for the sole purpose of removing excess soil moisture from uplands primarily in agricultural use are not subject to regulation.

**Discussion:**

Subsections of 30305(4) exclude wetlands created incidentally as a result of the activities listed in each section. These exclusions are overly broad and could result in the exclusion from permitting some wetlands that do meet the definition of a water of the U.S. Specifically, Section 30305(4)(d) excludes from regulation wetlands incidentally created by the construction of some drains/ditches.

Some ditches, and wetlands that form within them, are excluded from the definition of waters of the U.S. when specific conditions are met. According to the 2008 Rapanos Guidance<sup>12</sup>:

*“The agencies generally will not assert jurisdiction over . . . Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water (P1).”*

Section 30305(4)(d) does not include the same conditions as the ditch exclusion within the 2008 Rapanos Guidance (e.g., flow restriction). As such, some ditches and wetlands within them that are excluded from state regulatory authority by Section 30305(4)(d) are “waters of the U.S.” which cannot be categorically excluded from jurisdiction.

**Finding:**

This section is **inconsistent** with the CWA Section 404 and federal regulations.

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<sup>12</sup> Rapanos Guidance: *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, December 2, 2008.

**28. Sec. 30305(4)(e) – Incidental creation of wetlands from construction of roadside ditches in uplands<sup>9</sup> for removing excess soil moisture from upland**

This is a new provision which excludes from regulation wetlands incidentally created by the construction of roadside ditches<sup>13</sup> in upland for the sole purpose of removing excess soil moisture from upland.

**Discussion:**

Section 30305(4)(e) categorically excludes from regulation wetlands incidentally created by the construction of some roadside ditches. Under federal requirements, the wetlands that incidentally form within a drain/ditch are not waters of the U.S. if the drain/ditch that contains the wetlands is not jurisdictional. On the other hand, wetlands forming within jurisdictional waters (including some ditches) are jurisdictional and thus cannot be categorically excluded from regulation. (See #27, 28, and 30)

Some ditches are excluded from the definition of waters of the U.S. when specific conditions are met. According to the 2008 Rapanos Guidance <sup>14</sup>:

*“The agencies generally will not assert jurisdiction over . . . Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water (P1).”*

The language in Section 30305(4)(e) does not include the same conditions as the ditch exclusion within the 2008 Rapanos Guidance (*e.g.* flow restriction). As such, some ditches and wetlands within them that are categorically excluded from state regulatory authority by Section 30305(4)(e) are “waters of the U.S.” which cannot be excluded from jurisdiction.

**Finding:**

This section is **inconsistent** with the CWA Section 404 and federal regulations.

**29. Sec. 30305(4)(f) – Incidental creation of wetlands from agricultural soil and water conservation practices**

This is a new section which excludes from regulation wetlands created as a result of implementing an agricultural soil and water conservation practice designed, constructed, and maintained for the purpose of enhancing water quality.

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<sup>13</sup> Sec. 30305(4)(e) refers to “roadside ditches”. For the purpose of this document, EPA considers the term “roadside ditches” in Section 30305(2)(i) equivalent to “drainage ditches” in 40 C.F.R. § 232.3.

<sup>14</sup> Rapanos Guidance: *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, December 2, 2008.

### **Discussion:**

CWA Section 404(f)(1)(a) exempts discharges of dredged or fill material associated with normal farming activities into waters of the United States, and lists “upland soil and water conservation practices” as an example of normal farming activities that are exempt from 404 permitting requirements.

EPA appreciates the State encouraging agricultural practices that enhance water quality. However, while this provision of PA 98 appears to echo the exemption in section 404(f)(1)(a), the purpose of this provision of PA 98 is to exempt incidentally created wetlands from jurisdiction, not the discharges associated with normal farming activity. Wetlands incidentally created as a result of these normal farming activities in uplands, would be jurisdictional if they meet the definition of jurisdictional waters under the CWA and implementing regulations. Because Section 30305(4)(f) applies an exemption for discharges associated with certain activities in a way that categorically exempts certain waterbodies that may be waters of the U.S. from jurisdiction, it is inconsistent with the CWA.

### **Finding:**

This section is **inconsistent** with the CWA and federal regulations.

### **30. Sec. 30305(5) – Contiguous Waters as a Result of Excavation**

This is a new section which excludes from regulation:

*An area that becomes contiguous to a water body created as a result of commercial excavation for sand, gravel or mineral mining is not subject to regulation under this part solely because it is contiguous to the created water body. This exemption from regulation applies until the property on which the wetland is located meets both of the following requirements:*

- a) Is no longer used for excavation as part of commercial sand, gravel, or mineral mining.*
- b) Is being used for another purpose unrelated to excavation as part of commercial sand, gravel, or mineral mining.*

### **Discussion:**

The provision in Section 30305(5) categorically disallows a water body as the result of commercial excavation for mining from being considered as a connection when considering a wetland’s jurisdictional status until mining has ceased and the waterbody is being used for a different purpose.

Under the federal CWA 404 program [such] wetlands are regulated if they meet the definition of jurisdictional waters under the CWA and implementing regulations. Under the

federal regulations, even though a waterbody created as a result of excavation may not be jurisdictional, it may serve as a connection to make an adjacent water jurisdictional. (See also comments under #49 regarding Section 30321(6) – Use of Drains to Establish Jurisdiction). Section 30305(5) would prevent MDEQ from using a waterbody created from excavation to establish a connection between an upstream water and downstream water for the purpose of finding the upstream water jurisdictional, until such time as the connecting water is itself considered a jurisdictional water under Michigan law. Therefore, this section is inconsistent with the CWA.

**Finding:**

This section is **inconsistent** with the CWA and federal regulations.

**31. Sec. 30305(8) – Definition of Agricultural Drain**

This section of PA 98 added the same definition of “agricultural drain” as was added to Section 30103(3), as follows:

*As used in this part, “agricultural drain” means a human made conveyance that meets all of the following requirements:*

- (a) Does not have continuous flow.*
- (b) Flows primarily as a result of precipitation-induced surface runoff or groundwater drained through subsurface drainage systems.*
- (c) Serves agricultural production.*
- (d) Was constructed prior to January 1, 1973, or was constructed in compliance with this part of former 1979 PA 203.*

**Discussion**

The CWA and implementing regulations do not include or define the term “agricultural drain.” The addition of a term which does not exist in federal law does not in itself raise questions of consistency with federal law. However, the way in which the term is used may raise these questions, specifically, the use of the term in Section 30103(1)(d) [agricultural drain maintenance exemption] discussed above, and in Section 30305(h)) [agricultural drain maintenance exemption], and Section 30321(6) [Use of drains to establish jurisdiction] discussed below.

Please see the specific findings for Sections 30103(1)(d), 30305(h) and 30321(6) as they relate to the definition of “agricultural drain”.

**Finding:**

The definition here **does not affect consistency** with the CWA Section 404.

### **32. Sec. 30306(1) through (6) – Application requirements, application fees**

All of the changes in this section of the statute relate to permit fees, permit processing time frames or requests for meeting with the Department.

#### **Discussion:**

These changes are not directly related to activities that are regulated under CWA Section 404.

#### **Finding:**

These changes **do not affect consistency** with requirements for processing permits under CWA Section 404 and federal regulations.

### **33. Sec. 30306(7) – Conditional Permits Under Emergency Conditions**

These changes are not directly related to activities that are regulated under CWA Section 404.

#### **Discussion:**

These changes do not affect consistency with requirements for processing permits under CWA Section 404.

#### **Finding:**

Changes to this section are **do not affect consistency with** the CWA Section 404.

### **34. Sec. 30306b – Application Fees and Other Requirements**

These changes are not directly related to activities that are regulated under CWA Section 404.

#### **Discussion:**

These changes do not affect consistency with requirements for processing permits under CWA Section 404.

#### **Finding:**

Changes to this section are **do not affect consistency with** the CWA Section 404.

### 35. Sec. 30311(5) through (7) – Consideration of Feasible and Prudent Alternatives

Changes in this section of the statute relate to conducting the feasible and prudent alternatives analysis when assessing a proposed project for compliance with the 404(b)(1) Guidelines.

Section 30311(5) establishes a rebuttable presumption that alternatives located on property not presently owned by the applicant are not feasible and prudent if all of the following requirements are met:

- (a) The activity is described in Section 30304(a) or (b);<sup>15</sup>
- (b) The activity will affect not more than 2 acres of wetland; and
- (c) The activity is undertaken for the construction or expansion of a single family home and attendant features, the construction or expansion of a barn or other farm building, or the expansion of a small business facility.

Section 30311(6) states that consideration of feasible and prudent alternatives regarding the size of a proposed structure shall be based on the footprint of the structure and not the square footage of the structure.

Section 30311(7) states that the choice and extent of the proposed activity within a proposed structure shall not be considered in determining feasible and prudent alternatives.

#### **Discussion:**

The language in Section 30311(5) and (6) is consistent with the 404(b)(1) Guidelines and current federal guidance regarding flexibility afforded to small land owners when applying the feasible and prudent alternatives analysis.

Section 30311(5)(c) is consistent with the joint EPA/Corps memorandum entitled: *Individual Permit Flexibility for Small Landowners*<sup>16</sup> which clarifies that, for the purposes of the alternatives analysis, it is presumed that practicable alternatives are limited to property owned by the permit applicant in circumstances involving certain small projects (the construction or expansion of a single family home and attendant features, the construction or expansion of a barn or other farm building, or the expansion of a business) affecting less than two acres of non-tidal wetlands.

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<sup>15</sup> Sec. 30304 states:

“Except as otherwise provided in this part or by a permit issued by the department under sections 30306 to 30314 and pursuant to part 13, a person shall not do any of the following:(a) Deposit or permit the placing of fill material in a wetland. (b) Dredge, remove, or permit the removal of soil or minerals from a wetland.”

<sup>16</sup> <https://www.epa.gov/cwa-404/memorandum-individual-permit-flexibility-small-landowners>.

The effect of Section 30311(6) is to focus environmental review on the actual footprint of proposed structure, rather than the interior floor space (which in multi-story buildings could be significantly greater). This approach is appropriate, because it is the footprint of the project rather than the interior floor space which correlates to the size of wetland impact.

The language in 30311(7), which limits the consideration of “the choice and extent of the proposed activity . . .” in an alternatives analysis, is not consistent with the 404(b)(1) Guidelines. The alternatives analysis in Section 230.10(a) of the Guidelines requires the analysis of a number of factors, including but not limited to determining if a project must be located in a special aquatic site (which includes wetlands) to fulfill the basic purpose of the project, and whether there are other practicable alternatives available that are less damaging to the aquatic environment. If a project does not require “access or proximity to, or siting within a special aquatic site,” the project is not water dependent. Under the Guidelines, for non-water dependent projects, there is a presumption that practicable alternatives that do not involve wetlands are available.

**Finding:**

New language regarding the feasible and prudent alternatives in Section 30311(7) is **inconsistent** with the Guidelines. Other changes to this section are **consistent** with Guidelines.

**36. Deletion of Sec. 30311a – Consideration of Feasible and Prudent Alternatives**

Former Subsections 30311a (2)-(5) have been deleted from the statute. Former Subsections 30311a(2) and (3) included requirements for the MDEQ to adopt new guidance for the feasible and prudent alternatives analysis and the requirement that no permit be denied based on solely on consideration of statewide alternatives, higher cost, or reduced profit. The new guidance was adopted in 2011. Former Subsection 30311a (4) addressed granting extensions to permit processing times and former Subsection 30311a (5) limited the timeframe for filing a rule making request on feasible and prudent analysis to after October 1, 2012.

**Discussion:**

The deletion of these subsections of the statute does not have an impact on program consistency with the federal regulations.

**Finding:**

Deletion of previous language from this section **does not affect consistency** with the CWA Section 404.

**37. Sec. 30311d(5) – Compensatory mitigation, setting mitigation ratio**

New language added to this section states:

*If compensatory wetland mitigation is required, in setting the mitigation ratio the Department shall consider the method of compensatory mitigation, the likelihood of success, differences between functions lost by the impacted site and functions expected to be produced at the compensatory mitigation project, temporary losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and the distance between the affected aquatic resource and the mitigation site.*

**Discussion:**

40 C.F.R. § 230.93(f)(2) states that, “*The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site.*” (In the case of Michigan’s 404 program, the ratio of mitigation will be decided by MDEQ with EPA oversight.) The language in Section 30311d(5) is similar to that in the federal mitigation rule at 40 C.F.R. § 230.93(f)(2), and consistent with its effect.

**Finding:**

This subsection is **consistent** with the CWA and federal regulations, including the federal mitigation rule.

**38. Sec. 30311d(6) – Conservation Mitigation Credits for Easements for Impacted Agricultural Sites**

This new section states that:

*For agricultural activities, a permit applicant may provide for protection and restoration of the impacted site under a conservation easement with the Department as part of mitigation requirements. A permit applicant may make a payment into the stewardship fund, if established under subsection [30311d] (7), as part of mitigation requirements, as an alternative to providing financial assurances required under subsection [30311d](4).*

**Discussion:**

The effect of this section appears to be two-fold:

- 1) For agricultural activities, to allow for mitigation via protection and restoration of the impacted site under a conservation easement.

Site protection (e.g. placing a conservation easement over a property) is a required part of a wetland or stream compensatory mitigation plan, as described in the federal mitigation

rule. The goal of mitigation site protection is to protect the un-impacted or restored aquatic resources from adverse impacts. Preserving an active agricultural site would not protect aquatic resources, and therefore, may not be used as mitigation to compensate for impacts.

- 2) For agricultural activities, to provide an alternative to other recognized forms of financial assurance

The federal mitigation rule requires that financial assurances be provided for all compensatory mitigation projects in an amount that is sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed. The federal mitigation rule states that financial assurances are typically in the form of performance bonds, escrow accounts, legislative appropriations for government sponsored projects or other appropriate instruments. Each of these would ensure that, if needed, funds will be made available to manage or restore the site into the future. The establishment of a stewardship fund to use as a repository for financial assurances, while not specifically referenced in the mitigation rule, is not precluded by the 2008 Mitigation Rule. Should the MDEQ decide to establish a stewardship fund for meeting financial assurance requirements under the CWA, EPA will review the implementation of the fund as a Section 404 program revision to assure that it complies with the federal mitigation rule.

#### **Finding:**

The first sentence of this subsection is **inconsistent** with the federal mitigation rule at 40 C.F.R. § 230.93. The second sentence **does not affect consistency** with the mitigation rule; however, EPA will review any revision to Michigan's program to implement a stewardship fund for providing financial assurances, to assure that it is consistent with the CWA and the federal mitigation rule.

#### **39. Sec. 30311d(7) – Stewardship Fund**

This new section states that the department may establish a stewardship fund in the state treasury:

*The department may establish a stewardship fund in the state treasury. The state treasurer may receive money or other assets from any source for deposit into the fund. The state treasurer shall credit to the fund interest and earnings from fund investments. Money in the fund at the close of the fiscal year shall remain in the fund and shall not lapse to the general fund. The department shall be the administrator of the fund, for auditing purposes. The department shall expend money from the fund, upon appropriation, only to develop mitigation for impacted sites or as an alternative to financial assurance required under subsection (4).*

**Discussion:**

The effect of Section 30311d(7) is to allow the department to establish the stewardship fund described above in Section 30311d(6). Establishment of a stewardship fund to use as a repository for financial assurances is not precluded by the 2008 Mitigation Rule. Should the MDEQ decide to establish a stewardship fund for meeting financial assurance requirements under the CWA, EPA will review the implementation of the fund as a Section 404 program revision to assure that it complies with the CWA and the federal mitigation rule. This provision also authorizes MDEQ to expend funds to develop mitigation. To implement this, the state would first need to establish an EPA-approved in-lieu fee program.

**Finding:**

This subsection **does not affect consistency** with the federal mitigation rule at 40 C.F.R. § 230.93. However, implementing a stewardship fund for providing financial assurance would require a program revision. EPA would review such a program revision for consistency with CWA requirements. In order for the stewardship fund be used for developing and implementing new mitigation plans, MDEQ would have to develop an in-lieu fee program, subject to EPA review and approval.

**40. Sec. 30311d(8) – Compensatory Mitigation Rulemaking**

This new section states that within one year after the effective date of the act:

The department shall submit to the office of regulatory reform administrative rules on mitigation that do all of the following:

- (a) Reduce the preference for on-site mitigation.
- (b) Allow flexibility in the mitigation ratios for the uses of wetlands.
- (c) Allow a reduction of mitigation ratios when approved credits from a wetland mitigation bank are used.
- (d) Allow consideration of additional ecologically beneficial features.
- (e) Allow any excess mitigation for any project to be credited to another project at a later date.

**Discussion:**

Any compensatory mitigation rules developed by Michigan will need to be consistent with the federal rules governing compensatory mitigation at 40 C.F.R. Part 230 Subpart J. Regarding specific requirements of the future legislation:

*(a) Reduce the preference for on-site mitigation:*

This provision is consistent with the federal mitigation rule.

*(b) Allow flexibility in the mitigation ratios for the uses of wetlands:*

Pursuant to the federal mitigation rule, compensatory mitigation requirements must be commensurate with the amount and type of impact. While the term “use” in Section 30311d(8)(b) is ambiguous, it is reasonable to interpret “use” to be the “type of impact” as stated in the federal mitigation rule. If interpreted in this way, the flexibility in determining mitigation ratios provided in this provision would be consistent with the federal mitigation rule. For this reason, EPA believes that Section 30311d(8)(b) does not affect the consistency with the federal mitigation rule. MDEQ will need to develop rules to implement this and other provisions of Section 30311d(8) and these will need to be approved by EPA as program revisions. In its review of such rules, EPA will assure that they are consistent with the federal mitigation rule before approving them as program revisions.

- (c) Allow a reduction of mitigation ratios when approved credits from a wetland mitigation bank are used:*

This provision is consistent with the federal mitigation rule, which allows for some flexibility in mitigation requirements based on the type of mitigation as long as the mitigation is commensurate with the impacts.

- (d) Allow consideration of additional ecologically beneficial feature:*

Section 30311d(8)(d) does not define the term “ecologically beneficial features” Nevertheless EPA believes that rules developed to implement this provision can be written to assure consistency with the federal mitigation rule. For this reason, EPA believes that Section 30311d(8)(d) does not affect consistency with the federal mitigation rule. In its review of Michigan’s rules to implement this section, EPA will assure that they are consistent with the federal mitigation rule.

- (e) Allow any excess mitigation for any project to be credited to another project at a later date:*

The federal mitigation rule describes three methods of mitigation: use of a mitigation bank, use of an in-lieu fee program or permittee responsible mitigation. Only approved mitigation banks or in-lieu fee credits can be used as mechanisms for transferring mitigation credits *between* applicants. The mitigation rule does allow advanced permittee-responsible mitigation, which can be created prior to permit issuance, and mitigation credit can be deducted by the *same* applicant at a later date when the permit is issued. Advanced permittee-responsible mitigation must comply with the mitigation rule, and there are many conditions that constrain its usage, including a prohibition against transferring credits to a different applicant. While Section 30311d(8)(e) does not include conditions limiting its implementation consistent with the federal mitigation rule, EPA believes that Section 30311d(8)(e) does not prevent MDEQ from developing rules that would limit the provision to advanced permittee responsible mitigation in a manner that would be consistent with federal mitigation rule. For this reason, EPA believes that Section 30311d(8)(e) does not affect Michigan’s program consistency with the federal mitigation rule. MDEQ

will need to assure the rules are consistent and EPA will review those as future program revisions.

**Finding:**

Paragraphs (8)(a) and (8)(c) are **consistent** with the federal mitigation rule. Paragraphs (8)(b) (d) and (e) **do not affect consistency** with the federal mitigation rule, because MDEQ can develop rules to implement these provisions in a manner to be consistent with the federal mitigation rule. EPA will review such rules to assure that they are consistent with the federal mitigation rule before approving them as program revisions.

**41. Sec. 30311d(9) – Rulemaking to Encourage Mitigation Banks**

This new section states:

*The department shall submit revised administrative rules that encourage the development of wetland mitigation banks.... The rules shall do all of the following:*

- (a) Enlarge mitigation bank service areas. However, a service area shall be located within the same watershed or eco-region as the permitted project or activity, ensure no net loss of the wetland resources, and protect the predominant wetland functions of the service area. The department shall consider enlarging the size of the eco-regions for mitigation bank service areas.*
- (b) Allow earlier release of credits if the benefits of a mitigation bank have been properly established and the credits are revocable or covered by a financial assurance.*
- (c) Allow wetland preservation to be used in areas where wetland restoration opportunities do not exist, if an unacceptable disruption of the aquatic resources will not result.*

**Discussion:**

Subsection 30311d(9)(a): To be consistent with the federal mitigation rule, the service area for a bank must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area. The basis for the proposed service area must be documented and should be based on watershed, eco-region, or physiographic province. This provision does not affect Michigan's program consistency with federal requirements because it does not preclude MDEQ from adopting rules which are consistent with the federal mitigation rule.

Subsection 30311d(9)(b): This subsection is consistent with federal regulations, which gives some flexibility allowing early credit releases from mitigation banks when it is appropriate.

Subsection 30311d(9)(c): The federal mitigation rule identifies specific criteria for use of preservation as mitigation. Provided these criteria are met, preservation can be used to

provide mitigation. This provision does not affect Michigan's program consistency with federal requirements because it does not preclude MDEQ from adopting rules which are consistent with the federal mitigation rule. EPA will review revised rules developed by MDEQ to implement this section, to assure consistency with the federal mitigation rule. EPA will also review permits to assure that where preservation is used as mitigation, it is done consistent with the federal mitigation rule.

**Finding:**

Subsection 30311d(9)(b) is **consistent** with the federal mitigation rule. Subsections 30311d(9)(a) and (c) **do not affect consistency** with the federal mitigation rule, however MDEQ's revised rules must be written in such a way to assure consistency with the federal mitigation rule.

**42. Sec. 30311d(10) – Mitigation Bank Funding Program**

This new language states:

*The department shall establish a wetland mitigation bank funding program under Part 52 that provides grants and loans to eligible municipalities for the purposes of establishing mitigation banks.*

**Discussion:**

Provisions for *state* funding of mitigation banks are not subject to EPA oversight. However, that 40 C.F.R. § 230.93(j)(2) places the following restrictions on *federal* funding for compensatory mitigation projects:

*"Except for projects undertaken by federal agencies, or where federal funding is specifically authorized to provide compensatory mitigation, federally-funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project."*

Provisions for state funding of mitigation banks are not subject to EPA oversight. It is important to note that 40 C.F.R. § 230.93(j)(2) places restrictions on funding for compensatory mitigation projects including: 1) Federal funding may not be used to generate compensatory mitigation credits for activities authorized by a 404 permit unless the project is undertaken by federal agencies, or 2) federal funding is specifically authorized to provide for compensatory mitigation. Section 30311d(10) does not preclude MDEQ's establishment of a funding program consistent with these restrictions, and therefore do not affect Michigan's

program consistency with federal requirements. EPA will review any mitigation bank proposals for consistency with the federal mitigation rule.

**Finding:**

Section 30311d(10) **does not affect consistency** with the CWA and federal regulations provided other applicable restrictions on use of federal funds are complied with if federal funds are used. EPA will review any mitigation bank proposals for consistency with the federal mitigation rule.

**43. Sec. 30312(5) – General Permits**

This section includes new language which states that the department may develop new general and minor permit categories and *“may alter the scope of the activities covered under general and minor permit categories corresponding to Nationwide Permits if any adverse environmental effects will be minimal.”*

**Discussion:**

The language in Section 30312(5) does not affect the Michigan 404 program’s consistency with regulations at 40 C.F.R. § 233.21, which provide for the issuance of general permits for activities with minimal impact. MDEQ must assure that any general permits are issued consistent with the CWA and federal regulation. The issuance of these permits is subject to EPA oversight.

**Finding:**

The language in Section 30312(5) **does not affect consistency** with the CWA. General permits developed by MDEQ must be consistent with the provisions in the CWA and federal regulations.

**44. Sec. 30312(6) – General Permits for Blueberry Operations**

This new section requires MDEQ to develop a general permit for alteration of wetland for blueberry farming that includes minimal drainage and earth moving if the following requirements are met:

- (a) *The wetland will be restored when farming activities in the wetland cease.*
- (b) *The farmed wetland is placed under conservation easement protection until the wetland is restored when farming activities cease.*
- (c) *Activities that convert the wetland to a non-wetlands are prohibited.*
- (d) *Roads, ditches, reservoirs, pump houses and secondary support facilities for shipping storage, packing, parking and similar purposes are prohibited unless authorized under Section 30305.*

**Discussion:**

Pursuant to the Section 404 state assumption regulations found at 40 C.F.R. §§ 233.21 and 233.50, before the state may issue a General Permit the state must assess the proposed activities for compliance with the CWA section 404(b)(1) Guidelines and determine whether or not the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

Changes to this Section do not affect the Michigan 404 program's consistency with the CWA. However, MDEQ will need to develop the general permits consistent with the requirements at 40 C.F.R. §§ 233.21 and 233.50. EPA will also review draft general permits for consistency with CWA Section 404 requirements.<sup>17</sup>

**Finding:**

Changes to this Section **do not affect consistency** with the CWA. General permits developed by MDEQ must be consistent with the requirements referenced above.

**45. Sec. 30312(7) – General Permits for Blueberry operations by Dec 31, 2013**

This section requires the MDEQ to propose new general permits or minor project categories for conversion of wetland to blueberry farming or other agriculture that includes more than minimal drainage or earth moving.

**Discussion:**

Federal regulations do not prohibit the MDEQ from proposing such a general permit. However, as outlined above in the findings for Section 30312(6), a General Permit cannot be issued until it has been through the review process identified in the federal regulations at 40 C.F.R. §§ 233.21 and 233.50.

Changes to this Section do not affect Michigan's program consistency with the CWA. However, MDEQ will need to develop the general permits consistent with the requirements at 40 C.F.R. §§ 233.21 and 233.50. EPA will also review draft general permits for consistency with CWA Section 404 requirements.

**Finding:**

Changes to this Section **do not affect consistency** with the CWA. However, new general permits developed by MDEQ must be consistent with the requirements referenced above.

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<sup>17</sup> EPA formally objected to a proposed MDEQ general permit for blueberry operations on March 31, 2014.

#### 46. Sec. 30321(5) – Definition of "Not Contiguous"

This section includes new language stating that *"a wetland is not contiguous to the Great Lakes, Lake St. Clair, an inland lake or pond or a river or stream if the Department determines that there is no direct physical contact and no surface or interflowing groundwater connection to such a body of water."*

##### Discussion:

"Contiguous" is used in Michigan's statutory definition of "wetland" at Section 30301(m), and is defined by Rule 281.921(1)(b). "Contiguous" is also used in the definition of "adjacent" in the definition of waters of the United States at 40 C.F.R. § 230.3(b), which indicates that a wetland is adjacent when it is bordering, neighboring, or contiguous. "Adjacent" is a key term governing the geographic scope of the CWA, but it is not used in Michigan's wetlands statute.

"Contiguous" is not defined in the federal regulations clarifying the scope of waters of the United States. The meaning of contiguous in regard to waters of the United States is not the same as the definition of "contiguous" within Section 303 of Michigan's wetland statute. Even so, in its 2008 review of Michigan's program, EPA determined that Michigan's definition and use of "contiguous" as well as other jurisdictional thresholds made Michigan's program consistent with the jurisdictional scope of the CWA.

It is unclear whether the State is equating "contiguous" with "adjacent," which similarly would be a narrowing of the definition of protected waters. Adjacency does not require direct physical contact with the water to which a wetland is adjacent. Indeed, as noted in EPA's regulations at 40 C.F.R. § 230.3(b), the term adjacent includes *"[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like..."*

Under its assumed 404 program, Michigan must regulate all waters adjacent to inland lakes, ponds, rivers, and streams that meet the definition of waters of the United States. The proposed definition of "not contiguous" in Section 30321(5) of PA 98 narrows the State's previously broad definition of "contiguous" and is inconsistent with federal regulation, guidance and case law because it could be interpreted to exclude adjacent waters and wetlands regulated under the CWA.

##### Finding:

This section is **inconsistent** with the CWA and federal regulations.

#### **47. Sec. 30321(6) – Use of Drains to Establish Jurisdiction**

This section states:

*The department shall not consider an agricultural drain, as defined in section 30305, in determining whether a wetland is contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.*

##### **Discussion:**

Nothing in federal law excludes consideration of agricultural drains when determining connection to waters of the United States. The CWA provides that “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). The term “discharge of any pollutant” in turn, includes “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).2. The CWA defines “navigable waters” as the “waters of the United States.” 33 U.S.C. § 1362(7). Corps regulations interpret the CWA to mean that its regulatory jurisdiction extends over, *inter alia*, traditional navigable waters, the tributaries, and wetlands which are adjacent to any of the above. 33 C.F.R. § 328.3(a). The statute and regulations do not exclude agricultural drains from consideration in determining jurisdiction.

In fact, even if an agricultural drain is not a water of the U.S., it may serve as hydrologic connections relevant to the presence of a significant nexus or other bases for jurisdiction. The 2008 Rapanos Guidance<sup>18</sup> clearly explains the use of non-jurisdictional waters as connects to downstream waters:

*“Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water” (p12).*

Section 30321(6) would not allow agricultural drains to be considered in determining connections for Waters of the U.S jurisdictional determinations. Under the CWA, agricultural drains are not exempt from consideration in determining such connections.

##### **Finding:**

This provision is **inconsistent** with the CWA and federal regulations.

#### **48. Sec. 30321(7) – Defines Drains, Ditches etc. as not wetlands**

This section states that a “*drainage structure such as a culvert, ditch, or channel, in and of itself, is not a wetland. A temporary obstruction of drainage, in and of itself, is not a wetland until the presence of water is of sufficient frequency and duration to be identified as wetland pursuant to section 30301(2).*”

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<sup>18</sup> *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, December 2, 2008.

### **Discussion:**

The effect of this section is twofold:

1. The first sentence asserts that drainage structures such as culverts, ditches and channels are not regulated as wetlands under Part 303 of the Michigan NREPA. This is inconsistent with the CWA because a drainage structure may consist of or contain regulated wetlands if the area meets the definition of a wetland at 40 C.F.R. § 232.2. If a drainage structure includes a wetland by definition, it must be identified accurately and regulated appropriately under Part 303, even if the culvert, ditch or channel is also regulated under Part 301. Without an accurate identification of the wetland resources (which the CWA labels special aquatic sites), EPA and MDEQ cannot adequately assess compliance with the 404(b)(1) Guidelines. Therefore, the first part of Section 30321(7) is inconsistent with the CWA.
2. The second part of Section 30321(7) states that a temporary obstruction of drainage is not regulated under Part 303 unless it meets the tests for wetlands in Section 30301(2), in which case, it would be regulated under Section 303. The definition of a wetland in Section 30301(2) is consistent with that the CWA definition at 40 C.F.R. § 232.2. Therefore, the second sentence in Section 30321(7) is consistent with the CWA.

### **Finding:**

The first sentence of this section is **inconsistent** with the CWA and federal regulations. The second sentence of this section is **consistent** with the CWA and federal regulations.

#### **49. Sec. 30328 – State program limited to “Navigable Waters” and waters of the United States as defined by federal statute, regulations, and court decisions**

This subsection states that the Section 404 program that has been assumed by the MDEQ will regulate only waters of the United States.

### **Discussion:**

Michigan is responsible for assuring that its approved Section 404 program meets the minimum requirements established by the CWA. At the State’s discretion, it may also choose to regulate waters beyond waters of the United States as defined by federal statute, regulations, and court decisions, but is not required to do so in order to maintain the 404 program.

### **Finding:**

This section is **consistent** with CWA Section 404 and federal regulations.